

No. 43157-2-II

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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GRANVILLE CONDOMINIUM HOMEOWNERS ASSOCIATION,  
a Washington non-profit corporation,

Appellant/Cross-Respondent,

v.

MICHAEL K. KUEHNER and  
BRENDA K. KUEHNER,

Respondents/Cross-Appellants.

FILED  
COURT OF APPEALS  
DIVISION II  
2012 JUN 21 AM 11:09  
STATE OF WASHINGTON  
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**APPELLANT/CROSS-RESPONDENT'S CORRECTED BRIEF**

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**I. ASSIGNMENTS OF ERROR**

1. The court erred in denying Granville's motion for partial summary judgment.
2. The court erred in granting Kuehners' motion to dismiss under CR 12(b)(6).

**II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Does a recorded condominium declaration constitute constructive notice to a non-owner tenant of a residential condominium unit?
2. Does the making of sporadic payments of the monthly homeowners association assessments by a tenant constitute an acknowledgment of liability for those payments by the tenant?
3. Does the Washington condominium act, RCW 64.34.364(12), give a homeowners association a direct cause of action against a non-owner tenant for the monthly assessment for common expenses?
4. Is a non-owner tenant of a condominium unit receiving benefits supplied by the homeowners association such as water, refuse collection, elevator service, etc. liable to the homeowners association for those benefits under the theory of quantum meruit?
5. May an owner of a condominium unit who is obligated to

contribute toward the monthly's expenses not only default on the same, but permit a third-party tenant to occupy the residential unit without the tenant having any obligation to pay for those expenses directly benefiting the tenant?

### **III. STATEMENT OF THE CASE**

#### **1. Facts**

The Granville Condominium is a residential condominium located in Tacoma, and was established pursuant to a Condominium Declaration recorded on October 9, 2006, under Pierce County recording number 200610090517. CP 107-162.

The Condominium Declaration in Section Sixteen (f) (CP 133) requires each condominium unit owner to contribute a monthly assessment to the Granville Condominium Homeowners Association ("Granville"), which is to be paid as a contribution toward the common expenses of operating and maintaining the condominium, including supplying water, refuse pick-up, elevator maintenance and service, fire alarm monitoring, electricity for common areas, insurance, etc. CP 19.

The Declaration in Section Eleven (b) requires that: "each lease or rental agreement shall be in writing and by it's terms shall provide that the terms of the lease or rental agreement are subject in all respects to the provisions of this declaration and the by-laws of the association, and all

rules and regulations promulgated there under.” CP 118.

The Condominium Declaration provides in Section Sixteen (k) that Granville has the right to collect “so much of the rent for such condominium as required to pay any amount due for assessments, together with any interests and costs that might be owed to the association in the event that such assessments are in default over thirty days.” CP 135.

Unit 500 of said condominium is owned by Casey and/or Gwen Ingels. The monthly assessment for unit 500, owed to Granville is \$807.18. Ingels apparently leased or rented unit 500 to Michael K. Kuehner and Brenda K. Kuehner (“Kuehners”) in about December, 2010. It is not known for sure as to when Kuehners actually took occupancy, but it was no later than December, 2010. CP 20.

On about January 25, 2011, Kuehners made a partial payment to Granville in the amount of \$400.00, and a second payment of \$400.00 on about February 17, 2011. On about April 11, 2011, Kuehners made a payment of \$800.00 to the plaintiff, and on about June 4, 2011, Kuehners made another payment of \$800.00 to the association for unit 500. No other payment for the period from January, 2011 through date hereof were made by either Ingels or Kuehners. CP 20-21.

The total of the monthly assessments for unit 500 for the year 2011 is \$9,686.16. Applying the four payments made by Kuehners as described



above, leaves a principal delinquency of \$7,286.16. Interest at 12% on said amount equals \$4,085.79. CP 21.

2. Summary of Proceedings

Granville filed a complaint against Kuehners asking for judgment for unpaid homeowners association dues during the period of their occupancy, together with judgment for the unpaid dues for the period prior to their occupancy, plus reasonable attorney's fees as provided for in the recorded condominium declaration. CP 1-5.

Kuehners filed an answer denying any liability as tenants, and alleging affirmative defenses. CP 6-8.

Granville then filed a motion for partial summary judgment asking for judgment for the unpaid monthly homeowners association dues only for the period of Kuehners' occupancy. CP 9-10.

Kuehners filed a motion for dismissal of Granville's entire complaint under CR 12( b)(6), and for award of reasonable attorney's fees under CR 11 contending that Granville's complaint is frivolous as to Kuehners. CP 170-174.

The two motions were argued at the same time, after which argument the court entered a summary order granting dismissal of Granville's complaint in its entirety under CR 12( B)(6), but denying any award of attorney's fees. CP 212.

Granville filed a timely notice of appeal on March 5, 2012.

CP 207-209. Kuehners then filed a notice of appeal on March 6, 2012.

CP 210-212.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

The standard of review when an appeal is taken from an order of summary judgment was succinctly stated in *Post v. City of Tacoma*, 167 Wn.2d 300 (2009) wherein, at page 308, the court stated:

When reviewing an order of summary judgment, this court engages in the same inquiry as the trial court. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Summary judgment is rendered where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). All facts and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Statutory interpretation is a question of law that this court reviews de novo. *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006). The applicability of the constitutional due process guaranty is a question of law subject to de novo review. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003).

In the case at bar, there was a denial of a motion for partial summary judgment, and the granting of a motion for dismissal of plaintiff's complaint, with prejudice, under CR 12(b)(6). That order of dismissal was the equivalent of a summary judgment. A trial court's

ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is a question of law that the appellate court reviews de novo. *Modern Sewer Corp. v. Nelson Distributing, Inc.*, 125 Wash. App. 564, 109 P.3d 11 (2005).

**B. The Condominium Declaration is a recorded document and therefore constitutes notice to the public, including tenants, of the obligation to pay the monthly assessments to the homeowners association.**

"The recording of an instrument is constructive notice only to those parties acquiring interests subsequent to the filing and recording of the instrument." *Kendrick v. Davis*, 75 Wn. 2d 456, 464, 452 P.2d 222 (1969). Kuehners clearly acquired their leasehold interest in unit 500 subsequent to the recording of the Condominium Declaration in 2006, so they are charged with knowledge of their obligation to pay the monthly assessments.

The recorded Condominium Declaration requires that "each lease or rental agreement shall be in writing and by its terms shall provide that the terms of the lease or rental agreement are subject in all respects to the provisions of this Declaration and the bylaws of the association, and all rules and regulations promulgated there under."

The Kuehners had no written lease or rental agreement with the owners of the unit. CP 163. The Kuehners were not paying any rent.

CP 164.

**C. Kuehners had actual knowledge as well as constructive knowledge of the requirement of paying the monthly dues.**

Kuehners acknowledged that they had actual notice of their personal obligation to pay the monthly assessments to Granville by making four payments to the association. CP 20.

**D. The Washington Condominium Act also makes a transferee, such as tenant, liable for all the unpaid assessments.**

If the recorded declaration was not enough to confirm the personal liability of Kuehners, the Condominium Act, RCW 64.34.364, gives Granville a lien for any unpaid assessments. Subsection (12) of that statute states:

In addition to constituting a lien on the unit, each assessment shall be the joint and several obligation of the owner or owners of the unit to which the same are assessed as of the time the assessment is due. In a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor to the time of grantor's conveyance, without prejudice to the grantee's right to recover from the grantor the amount paid by the grantee therefore. Suit to recover a personal judgment for any delinquent assessment shall be maintainable in any court of competent jurisdiction without foreclosing or waiving the lien securing such sums.

“... a lease is a conveyance, the grant of an estate...”. Washington Real Property Desk Book, Vol. II, 3<sup>rd</sup> Ed., § 27.2(4). Even though the Kuehners did not have a written agreement with the owner of the unit,

they were obviously being granted a possessory estate in unit 500, and therefore, under the intent of RCW 64.34.364 (12), they should be liable for the unpaid monthly assessments, at least during the period of their occupancy. They should not be able to avoid the requirements of the Condominium Declaration or the statute by simply taking possession of the premises as a tenant, without any written agreement.

In this case, the owner of unit 500 (Ingels) was the grantor of a leasehold interest to Kuehners, who were the grantee of that interest. Kuehners are personally liable under RCW 64.34.364(12), and Granville clearly has a right to seek a personal judgment against them for the unpaid assessments during the period of their occupancy.

**E. Even if Kuehners were not obligated by their knowledge of the recorded requirement of payment of the monthly homeowner's dues, or the Condominium Act, they are obligated to pay for the benefits provided to them on the basis of quantum meruit.**

Translated from Latin, quantum meruit means "as much as he deserves". It describes the extent of liability on a contract implied by law, and is based on the premise that one who uses and enjoys the labor and materials of another should not be unjustly enriched thereby. Thus, the law implies a promise to pay a reasonable amount for the labor and materials absent an express promise to do so. Black's Law Dictionary 1119 (5th ed. 1979). Footnote 1, in *Ausler v. Ramsey*, 73 Wn. App. 231,

232, 868 P.2d 877 (1994).

Kuehners have been receiving their domestic water, paid for by Granville, as well as refuse pick-up service by the city of Tacoma, paid for by Granville, use of the elevator, which is maintained and serviced by Granville, as well as the lighting for the common areas, in addition to necessary alarm services and insurances on the premises, all paid for by Granville. CP 19. RCW 59.18.130(2) states that one of a residential tenant's duties is to: " Properly dispose from his or her dwelling unit all rubbish, garbage, and other organic or flammable waste, in a clean and sanitary manner at reasonable and regular intervals..." That language seems to imply that the tenant is responsible for disposing of his refuse, which, for residents of the city, means having it picked up by the city refuse collection personnel. If the homeowners association did not provide and pay for a common refuse pickup service, the tenant would've had to pay for that service on his own. The tenant should obviously contribute to that common cost provided by the homeowners association. It is hard to imagine a scenario where someone living in a rented residential unit can claim to have no liability for the utilities and services they are using.

- F. Under Section Sixteen (h) of the Condominium Declaration, Granville is entitled to collect interest of 12% per anum, which is also the statutory rate allowed by RCW 19.52.010.**
- G. Granville is also entitled to recover its reasonable attorney's fees under Section Sixteen (h) of the Condominium Declaration, which provides that the association is entitled to recover its reasonable attorney's fees and costs in any action arising with regard to enforcement of the terms of the Condominium Declaration.**
- H. It was error for the trial court to dismiss Plaintiff's complaint under CR 12(b)(6).**

“CR 12(b)(6) authorizes a motion to dismiss for failure to state a claim on which relief can be granted. The rule offers a quick and convenient way for the defendant to avoid a claim when it is clear that the plaintiff will never prevail regardless of the facts proven at trial. Typical examples are cases in which the plaintiff's claim is clearly barred by the statute of limitations, or the plaintiff is asserting a cause of action that is not recognized in this state, or the defendant has some other ironclad defense as a matter of law.”

K. Tegland, 3A Wash Prac., Rules Practice – Superior Court Civil Rules, CR 12, at 264 (5th ed. 2006).

"Nevertheless, dismissals for failure to state a claim are considered a drastic remedy and are granted only sparingly. Motions are scrutinized with care, for the effective granting the motion is to deny the plaintiff his or her day in court." K. Tegland, 3A Wash Prac., Rules Practice – Superior Court Civil Rules, CR 12, at 264 (5th ed. 2006). For purposes of deciding the defendant's motion, all of the factual allegations in the

complaint will be accepted as true. *Dennis v. Heggen*, 35 Wn. App. 432, 667 P. 2d 131 (1983). The motion will be granted only if it appears beyond a reasonable doubt that the plaintiff could prove no facts consistent with the complaint that would entitle the plaintiff to the relief requested. *Orwick v. City of Seattle*, 103 Wn. 2d 249, 692 P.2d 793 (1984).

The trial court's granting of the dismissal, with prejudice, can only be justified if it is believed that, under the law, a tenant of a condominium unit who is not an owner can never, under any circumstances, be liable for the monthly assessment for common utilities and expenses benefitting the tenant. There is no question but that the recorded condominium declaration obligates all of the unit owners to contribute a monthly payment towards common expenses including water and services. There is also no question but that the condominium declaration, in section 11 (b) required that each lease or rental agreement be in writing, and by its terms provide that the agreement is subject in all respects to the provisions of the declaration. CP 118.

In the case at bar, the owners of unit 500 (Ingels), who were themselves already delinquent in payment of their monthly assessments (CP 19), allowed the Kuehners to occupy that residential unit, as tenants, without any written lease or rental agreement and without requiring them



to pay any rent. (CP 163-164) The Kuehners availed themselves of water being provided by the Homeowners Association, as well as the use of the elevator, the lighting of the common areas, the fire alarm and security system, etc. without paying for any of it. The theoretical question then becomes: "May an owner of a condominium unit who is obligated to contribute toward the monthly common expenses not only default on the same, but permit a third-party tenant to occupy the residential unit without the tenant having any obligation to pay for those expenses directly benefiting the tenant?" The logical extension of that question is: "Does a homeowners association have an obligation to provide water and other benefits to a tenant of a unit, free of charge, when neither the owner nor the tenant is contributing to payment of the same?" The answers to these two questions should obviously and logically be "no." If a tenant of a single family home uses utilities supplied by a third party, he should have to pay for them.

### **I. Attorneys Fees**

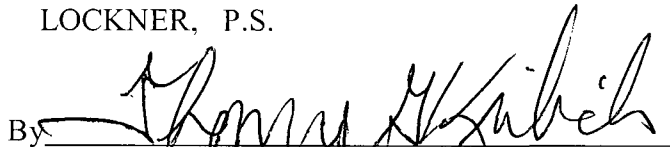
Section 16(h) of the condominium declaration (CP 134) provides that the Homeowners Association is entitled to recover its reasonable attorneys fees in any action to recover any unpaid assessments. The Granville homeowners Association should be entitled to recover its reasonable attorneys fees in this appeal.

## V. CONCLUSION

Granville is entitled to a partial Summary Judgment against Kuehners for the delinquent unpaid monthly homeowner's assessments for unit 500 during the period of their occupancy, together with interest at the statutory rate on each delinquent payment, or partial payment, together with Granville's reasonable attorney fees and costs. Granville's complaint should not have been summarily dismissed.

Respectfully submitted this 21<sup>st</sup> day of June, 2012.

KRILICH, LA PORTE, WEST &  
LOCKNER, P.S.

By 

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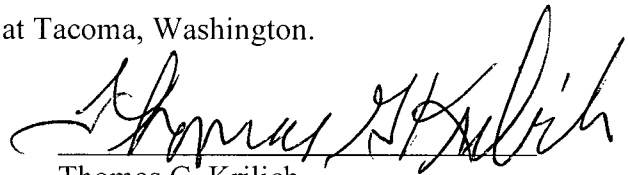
Attorney for Appellant/Cross-Respondent


# DECLARATION OF SERVICE

I, Thomas G. Krilich, hereby certify under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

On June 21, 2012, I personally delivered a true and accurate copy of this document to David Clement Smith, attorney for respondents/cross-appellants, at 201 St. Helens Avenue, Tacoma, Washington.

DATED: June 21, 2012, at Tacoma, Washington.

  
Thomas G. Krilich

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